

FACTA UNIVERSITATIS

Series: **Law and Politics** Vol. 13, N° 1, 2015, pp. 33 - 43

Original Scientific Paper

MULTIPARTY ARBITRATION: PROBLEMS AND LATEST DEVELOPMENTS

UDC 347.925

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Abstract. *The author presents key issues related to participation of multiple parties in the arbitration procedure. Consolidation of arbitration proceeding, resulting in a multi-party procedural relationship, as well as joinder and intervention of third persons, non-signatories to the arbitration agreement, are observed for the purpose of identifying possible problems that may be caused by their emergence in arbitration. The development of judicial approach to procedural questions raised by participation of multiple subjects in the contractual relationships giving rise to the dispute before the arbitral tribunal is showcased through the analysis of the 2010 United States Supreme Court decision, which sets grounds for restricting multi-party arbitration only to situations where participation of multiple parties in a single proceeding is expressly provided for in the arbitration agreement.*

Key words: *multi-party arbitration, arbitration agreement, consolidation, joinder, intervention.*

1. INTRODUCTION

The justification of interest in multiparty arbitration and its ever-growing significance could be boiled-down to three fundamental reasons: legal-political, normative, and practical.

The legal-political importance is in its ever-growing impact in the realm of the modern legal communication, which becomes more intense and more complex, with more transactions involving multiple participants, from which disputes eligible for resolution by the means of arbitration may derive (Buckner, 2004: 301-303). “Arbitration is suddenly everywhere. A veritable surrogate for the public justice system, it touches the lives of many persons who, because of their status as investors, employees, franchisees, consumers of medical care, homeowners, and signatories to standardized contracts, are bound to private processes traditionally employed by commercial parties” (Stipanowich, 1997: 3).

Received November 19th, 2015 / Accepted December 7th, 2015

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On the other hand, the normative significance of the subject-matter stems from the fact that arbitration procedural rules, contained in national regulations, international conventions or autonomous arbitral sources, in most cases do not provide directly applicable solutions for majority of problems, which may occur in the course of resolving complex or multiparty disputes; most of these issues may be addressed only indirectly, through the extensive interpretation or the accordant application of the provisions, tailored exclusively for the ordinary, bipolar, two-party procedural scheme of the arbitration proceedings.

In the international arbitration practice, there is no common standpoint on these issues and there are no universal principles that would govern the process of creating acceptable solutions for emerging problems. "In the international arbitration arena, certainty is important, uniformity is desirable, and the forceability is necessary" (Lew, 1978: 80).

The practical importance of the subject-matter may be seen in the need to identify and analyze problems which have emerged, or may surface, in the course of the practical application of particular solutions contained in national, foreign, autonomous or international arbitration sources, as well as in the necessity to anticipate potential complications which may occur, should some of the solutions originating from the arbitration jurisprudence or judicature be accepted on the broader level. Likewise, of the utmost importance is the application of the academic research results for the purpose of pointing to possible pathways for overcoming both theoretical and practical difficulties related to the participation of multiple subjects with party capacity in arbitral proceedings.

2. MULTIPARTY ARBITRATION ON THE GROUNDS OF ARBITRATION AGREEMENT

Arbitration agreement is the most common and universally accepted ground for instituting multiparty arbitration (*Volt Info. Sci., Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 1989; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 1995) In this context, the emphasis needs to be placed on multiparty agreements on arbitration as well as on the subjective scope limits of the arbitral agreement, i. e. the issue of its effect on non-signatories.

The consensus with respect to arbitral resolution of disputes deriving from multiparty or complex contractual relations is very hard to achieve. The difficulties are much greater when it comes to complex transactions, as compared to multilateral ones based on a single multiparty contract, since the relations between parties are regulated by multiple separate contracts.

The arbitrator, encountering the request for consolidation or the problems of joinder or intervention in arbitration, primarily will look into the provisions of the arbitration agreement. With respect to this, three possible situations may arise:

- a) the arbitration agreement expressly provides for consolidation, joinder or intervention of third parties in the arbitration proceedings;
- b) the arbitration agreement expressly excludes consolidation, joinder or intervention; and
- c) the arbitration agreement does not contain express provisions on consolidation, joinder or intervention, or it's vague on these issues (Rau, Sherman, 1995:110 – 118).

The issue of effect of the arbitration agreement on non-signatories needs to be viewed both through the examination and critical analysis of the existing normative solutions and through the analysis of the arbitration and state court practice, which is of the utmost importance in this area, due to the regulatory insufficiency.

The arbitrators' authority to resolve disputes is based exclusively on the parties' agreement to arbitrate. Therefore, generally speaking, a third party, who did not consent to participation in arbitration between two initial parties, cannot be forced to do so. However, in international arbitration practice, it is not uncommon for the arbitration proceeding to be initiated by or against non-signatories to the arbitration agreement. Such situations raise the question whether and under what conditions the arbitration agreement may be extended to be applied to such persons. According to American jurisprudence, there are three types of situations where non-signatories to the arbitration agreement may be coerced to partake in arbitration, or where such participation may be allowed: 1) when a non-signatory is deemed bounded by the arbitration agreement even though it was not a signatory thereto (*alter ego* doctrine, transfer of the arbitration agreement, commission etc); 2) when non-signatories enter with one of the parties into related contract, which by reference includes the arbitration clause contained in the initial contract; 3) when, due to their actions, persons may be deemed bounded to resolve their disputes in arbitration without their explicit consent to the specific arbitration (Lamm, Aqua, 2002-2003: 722-733).

Tightly connected to the issue of the arbitration agreement's effect on non-signatories is the so-called "Group of Companies" doctrine (Jarosson, 1994: 210; Sandrock, 1994: 174-176, and Blessing, 1994: 160-163). Although the legal individuality of a subject *inter alia* means that one member of the Group is not entitled to make legal commitments on behalf of the others (which also involves the exclusion of liability for the obligations of others towards third persons), in real life and especially in international business relations, groups of companies very often act as a single legal entity and form compact economic units, notwithstanding their legal pluralism. Therefore, it is not just to insist on the separability of legal identity in order to avoid arbitration, in cases when such separation is artificial and the effects of enforcing it would cause the breach of fairness in international business dealing (*Carte Blanche Pte. Ltd. Singapur v. Carte Blanche International Ltd.*).

3. MULTIPARTY ARBITRATION ON THE GROUNDS OF COURT DECISION

The state-court decision may be a ground for participation of multiple parties in arbitrations proceedings, in cases when such participation is not expressly provided for by the terms of the arbitration agreement. However, treating a court decision as an autonomous ground for instituting multiparty arbitration may only be conditional, since even the most liberal legal regimes still insist on parties' consensus as a primary basis for allowing the participation of multiple subjects in arbitration. This consensus, however, is not necessarily directed strictly to resolution of dispute or disputes in a multiple party proceedings; in most cases, by the means of broad interpretation and "legal gymnastics", the grounds for instituting multilateral arbitral procedural relationship is construed by court decisions. Most authors hold that coercive application of institutes on which multi-party arbitration may be grounded represents a total negation of justice, by overseeing the fact that arbitration, above all, is a creature of contract (Hascher, 1984: 127). Schaeffer holds that coercive consolidation causes injustice for those who refuse to contractually consent to multiparty arbitration (Schaeffer, 1988/1989: 498). Knežević points out that the arbitrators' authority stems from the parties' agreement and not the state's power (Knežević, 1997: 239).

However, the international legal relations are becoming more developed and more complex. As the international transactions are gaining in complexity, certain procedural problems in international arbitration are getting more frequent and more apparent. Certainly, among most complex issues in this field are those pertaining to consolidation, joinder and intervention of third parties in the arbitration proceedings. Numerous state courts and arbitral tribunals have taken a position, supported by majority of scholars, that third parties have no right to intervene in pending arbitration proceedings, nor are consolidation or joinder possible in the absence of all potential parties' consent (Redfern, Hunter, 1991: 184; Baldwin, 1996: 451-467; Rau, Sherman, 1995: 89-91, and Stipanovich, 1997: 506). However, the frequency of multilateral business transactions calls for re-examination of such position. The necessity is most apparent with respect to complex multi-party transactions, where all subjects involved are often not signatories to a single arbitration agreement, nor is it likely that consensus on a single multi-party arbitration agreement can be achieved subsequently. For example, international construction projects often include networks of independent contractual relations between parties of different nationalities (Schwartz, 1990: 310 - 34). Multi-party disputes also arise in the fields of maritime law, insurance and reinsurance, franchise, etc. (Hoellering, 1997: 41). Therefore, it is necessary to critically analyze the existing consolidation, joinder and intervention regimes, and to examine the options for broadening the grounds for their admissibility in light of basic arbitration principles as well as on the basis of the existing national, institutional and international regulations, irrespective of the content of the arbitration agreement. Higgins asks if the next step towards the effectuation of the pro-arbitration policy would be the mandatory consolidation of disputes between parties that are not bound by the arbitration agreement, nor are statutory related to the parties to the arbitration proceedings (Higgins, 1991: 1519 - 1534). Rau and Sherman consider situations in which the intervention would be justified irrespective of the content of the arbitration agreement (Rau, Sherman, 1995: 108 - 110), while Stipanovich notices that by opting for arbitration the parties sacrifice the advantages critical for the efficient resolution of multiparty disputes (Stipanovich, 1997: 476).

4. MULTIPARTY ARBITRATION IN THE CONTEXT OF TWO DIFFERENT APPROACHES TO THE LEGAL NATURE OF ARBITRATION

Those who view arbitration as a purely contractual phenomenon, having no common features with litigation (Redfern, Hunter, 1991: 186-187; Aksen, 1971: 5-14; Rau, Sherman, 1995: 111-118; Stipanovich, 1997: 494), hold that third persons, as aliens to the arbitral agreement, have absolutely no right to intervene or join the parties to the arbitration proceedings. Likewise, the court may not consolidate arbitration proceedings if such an option is not included in the parties' agreement to arbitrate. On the other hand, those who hold that an option to consolidate proceedings and the right to join or intervene should exist in a certain, limited scope, independently of the wording of the arbitration agreement, view arbitration as an individualized mechanism for resolving disputes in which party autonomy dominates, but they insist that certain pragmatic reasons and procedural principles, taken over from litigation, may influence its physiognomy. Motomura opposes the approach which pushes arbitration towards litigation but he notices the trend of viewing arbitration as a substitute and not alternative to the state court proceedings (Motomura, 1988: 77-78, 80 - 81).

It is not justified to insist on equalization of the terms of application of procedural institutes in litigation and arbitration, since contractual nature of arbitration preconditions numerous significant differences. Therefore, the imitation of litigation may not be a main feature of arbitration.

5. FORMS OF PARTICIPATION OF MULTIPLE SUBJECTS WITH PARTY CAPACITY IN THE ARBITRATION PROCEEDINGS

The participation of multiple parties as well as the existence of multiple claims are universal features of multi-party arbitrations. The most efficient way to decide on the rights and obligations of all of the parties, which ensures the highest level of legal certainty, is to apply procedural institutes which provide for the integrative decision-making in a single proceeding, i.e. consolidation of arbitration proceedings, joinder and intervention. Miller stresses out the avoidance of contradictory decisions rendered in separate proceedings as the major advantage of the single proceeding dispute resolution (Miller, 1986: 63).

Consolidation of arbitration proceedings is an institute mostly dealt with in legal writings on multi-party arbitration. Special attention is given to the problems of consolidation of arbitration proceedings based on arbitration agreement, to those pertaining to compulsory consolidation and, finally, to the issues related to consolidation of the arbitration proceedings (on the one hand) and state-court proceedings (on the other hand).

The analysis of agreement-based consolidation is mostly focused on the UNCITRAL legal framework. One step forward towards further adjustment thereof to the needs of multi-party arbitration would be to draft the model arbitration clause for multi-party arbitrations, tailored in accordance with the 1976 Arbitration Rules.

On the other hand, the results of research on compulsory consolidation show that neither the national legislations nor the leading arbitration institutions accept this form of consolidation. However, even when explicit omni-party consent to arbitration is missing, in some countries the consolidation may occur by the means of the so-called privity concept, which includes a specific relationship between subjects as a ground for broadening the subjective scope of contract to which only one of them is a party to the rest of them. Likewise, some courts have found grounds for consolidation in the implicit consent or the “Group of Companies” theory.

As for consolidation of arbitration proceedings and state-court proceedings, even though it may be desirable, it creates numerous conceptual and procedural difficulties. The party autonomy principle imposes the requirement that all potential parties to the consolidated proceeding agree to consolidation. The excessive court intervention, which would undermine the rule of consensualism with respect to consolidation, is definitely undesirable although it is often justified by the interests of efficiency and legal certainty.

In comparison to their counterparts in litigation, the specific features of joinder and intervention in arbitration derive from the contractual construction of arbitration and, among other things, they are reflected in the manner of their exercise, possible forms, and terms of admissibility.

When it comes to admissibility of intervention, the interested parties shouldn’t have right to intervene in the arbitration proceedings if they are not signatories to the arbitration agreement. This is the most broadly accepted viewpoint in both jurisprudence and judicature,

which is consistent with the contractual construction of arbitration. However, at least in international arbitration, such an *a priori* position is disputed by many, holding that the omnipresent liberalization of arbitration makes this restrictive approach to interpretation of arbitration clauses obsolete (Hanotiau, 2001: 256).

6. SPECIFIC FORMS OF MULTIPARTY ARBITRATION

Class arbitration is a specific form of legal protection of a large number of subjects. To this realm also belong concurrent, parallel and consecutive arbitrations, whose peculiarities are reflected in the fact that these forms actually do not include the conduct of a single proceeding with multiple parties, but rather multiple proceedings with different parties and related subject-matters, conducted before arbitral tribunals with the same personal composition, which result in the increased efficiency in resolving multiple disputes and the consistency of the arbitral awards rendered in separate proceedings.

7. JUDICIAL REVIEW OF ARBITRATION AWARDS

As for the judicial review of arbitration awards which resulted from multiparty arbitration, given that reaching an agreement as to two-instance arbitral dispute resolution mechanism by multiple parties is highly improbable, the attention has to be focused on the proceedings for annulment of arbitral awards, as well as the terms and procedures for recognition and enforcement of foreign arbitral awards.

In this respect, the effects of arbitral proceedings consolidation on the prospects for recognition of the award rendered in a consolidated proceeding raise numerous problems.

7. NATIONAL AND AUTONOMOUS REGULATIONS PERTAINING TO MULTIPARTY ARBITRATION

Since national legislations still have a major impact on international arbitration, the content of different national laws and practices is of great importance as a source of international arbitration law, primarily of those countries that are traditionally viewed as popular arbitration *fora* or those with innovative legislation in this field (USA, England, Hong Kong, Netherlands, Australia, Canada and France) – the emphasis, understandably, being on the provisions and decisions pertaining to consolidation, joinder and intervention.

On the other hand, due to the increase in competition (Kerr, Smit, 2002; Smit, Pechota, 1998), during the last couple of decades, numerous institutions have modified their arbitration rules, adjusting them to the altered international legal reality and, in many cases, triggering reforms of the national legislations on proceedings before state courts and arbitral tribunals. Some authors view arbitration dispute resolution system as an industry. The major players in this field are the International Chamber of Commerce, the American Arbitration Association, London Court of International Arbitration, Stockholm Chamber of Commerce, the International Center for Settlement of Investment Disputes, Zurich Chamber of Commerce, China International Economic and Trade Arbitration Commission, etc. (Smit, Pechota, 1998).

Because of their specific organizational structure, the arbitration institutions can amend their rules more promptly, in order to adjust them to situations which remain uncovered

by the national legislations. Therefore, it is realistic to expect that general modernization in the approach to the problems related to multiparty arbitration will firstly occur in the domain of autonomous arbitration rules of the leading arbitration institutions.

8. THE 2010 U.S. SUPREME COURT DECISION

In *Stolt-Nielsen*, the United States Supreme Court found that the arbitration panel exceeded its powers by imposing class arbitration on parties whose arbitration clause was silent on that issue.

Previous judicature on this issue includes cases such as *Lloyd's London v. Westchester Fire Ins. Co.*, which states that holding silence does not preclude consolidation and that arbitrators have discretion to allow consolidation, and *Rollins, Inc. v. Garrett*, which holds that holding silence does not preclude class arbitration and that the prohibition of class arbitration is unconscionable). Likewise, in *Westchester Fire Ins.*, the Third Circuit Court determined that imposing class arbitration is a procedural issue and should be resolved by the arbitrator. In reaching this decision, the court considered the following factors: prior federal case law (including the *Bazze* decision), the agreement by both parties to arbitrate disputes, the silence of the contract with respect to class arbitration and the federal policy strongly in favor of utilizing arbitration.

In *Stolt-Nielsen*, the Court reasoned that the arbitral tribunal was wrong to impose its own policy instead of “identifying and applying... the... law.” The Court observed, “Rather than inquiring whether the Federal Arbitration Act, maritime law, or New York law contains a “default rule” under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such situation.”

The Court’s decision was based on these two lines of arguments:

- First, the Law imposes “basic precept that arbitration is a matter of consent not coercion.” The Court opined that the parties “may specify with whom they choose to arbitrate their disputes.” Hence, it found that a “party may not be compelled... to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”
- Second, the Court drew the sharp distinctive line between bilateral arbitration and the class action arbitration and found that the “fundamental changes” are of such a degree that “it cannot be presumed that the parties consented to class action arbitration by simply agreeing to submit their disputes to an arbitrator.”

The Court concluded that the “differences between bilateral and class-action arbitration are too great for arbitrators to presume... that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” Likewise in *Champ v. Siegel Trading*, it was held that the court’s judgment should not deprive one party of benefit of bargain (*Champ v. Siegel Trading Co.*, 1995).

However, to some commentators it seems that the U.S. Supreme Court strayed from the proper interpretation of the grounds for *vacatur* of arbitral awards. The parties themselves empowered the arbitrators to render their clause construction award. Justice Ginsburg in her dissenting opinion rightly noted that “the panel did just what it was commissioned to do.”

In *Green Tree* case, the party in favor of class arbitration outlined three arguments in support of imposing class arbitration: (1) class arbitration is permitted under *Bazzele*, absent an express provision to the contrary; (2) the arbitration clause should be construed to allow class arbitration for public policy reasons; and (3) the arbitration clause would be unconscionable and unenforceable otherwise. However, the arbitrators rejected the first argument and did not consider the third, suggesting that public policy considerations had an overwhelming impact on the decision to impose class arbitration.¹

If the arbitral tribunal had jurisdiction (provided by parties' agreement to arbitrate), the award was final and binding on the parties, subject to limited grounds for *vacatur* of the award. It is not for the state court to agree or disagree with the award. Judicial review is statutorily limited, and it is undeniable that disagreement with the tribunal's award is not one of the grounds for annulment under any law. Federal Arbitration Act (9 U.S.C. § 10(a) (2006)) provides grounds for reversing arbitration awards. Section 10(a)(4) stipulates that an award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." In *Stolt-Nielsen*, the Court noted that the rationale behind this section was that arbitrators are charged with contract interpretation, and not entitled to formulate public policy. *Stolt-Nielsen III*, (130 S. Ct. 1758, 1767 (2010) (quoting 9 U.S.C. § 10(a)(4) (2006)) identifies Court's authority for vacating arbitrator's decision. However, in her dissent, Justice Ginsburg emphatically stated that the Supreme Court prematurely adjudicated the issue on appeal (*Stolt-Nielsen III*, 130 S. Ct. at 1777 (Ginsburg, J., dissenting)). She explained that the arbitration panel's resolution was a partial award and that the case had still been at a very early stage. As such, the award was an interlocutory decision, and the Court should not have intervened so early in the process, particularly because the panel did not render a final judgment. According to the decision in *Catlin v. United States*, (324 U.S. 229, 233 (1945) the final judgment rule essentially states that a decision should not be reviewed until a "final decision" has been rendered. In *Catlin*, the Court describes a "final decision" as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The rule is supported by a number of public policy considerations such as preventing piecemeal litigation and avoiding undue delays from appeals on interlocutory decisions. This rule is one that is firmly embedded in the federal courts.

Another question is what is wrong with arbitrators attempt to develop what the Court viewed as the best rule to be applied in such situation and to find the best solution to be applied to the specific case before them. Is this not what '*l'esprit de l'arbitrage*' actually represents?

Indian jurist Fali Nariman had written that the task for a good arbitrator is to ask him/herself in every single arbitral proceeding as to what justice demands in the fact situation presented, and then to inquire whether there is anything in the applicable law which would militate against the tribunal arriving at a just decision (Nariman, 2009). The

¹ AnimalFeeds outlined three arguments in support of imposing class arbitration: (1) that class arbitration is permitted under *Bazzele*, absent an express provision to the contrary; (2) the arbitration clause should be construed to allow class arbitration for public policy reasons; and (3) the arbitration clause would be unconscionable and unenforceable otherwise. However, the arbitrators rejected the first argument and did not consider the third, suggesting that public policy considerations had an overwhelming impact on the decision to impose class arbitration.

arbitrators in *Stolt-Nielsen* did exactly that. They have construed the arbitration agreement as they deemed best considering the circumstances of the case.

The *Stolt-Nielsen* decision is contrary to the limited judicial control power of the state courts over the arbitration awards. The U.S. Supreme Court disregarded advantages of the class action arbitration compared to the class action litigation and concentrated only on the obvious differences between bilateral and multi party arbitration.

9. CONCLUSION

There is no doubt that the problems related to the participation of multiple subjects with party capacity in the arbitration proceedings are so complex that the solutions thereto must be looked for at the borderlines of arbitration as we know it.

As the awareness level of the participants in international transactions is usually very high, in most cases it may be supposed that the parties, bearing the main features of arbitration in mind, have critically analyzed their positions and agreed on the dispute resolution mechanisms that suited best their interest perceptions.

Therefore, neither arbitral tribunals nor state courts should protect the parties from being insufficiently informed or incapable of predicting future events, nor should they have the authority to apply procedural rules inherent to state court litigation contrary to the expressed consent of the parties in order to achieve procedural economy and efficiency or to avoid inconsistent results.

On the other hand, the differences between legal traditions and legislations are still a factor that should be taken into account when discussing problems related to participation of multiple subjects with party capacity in the arbitration proceedings. Hence, it is necessary to adopt additional universal arbitration principles, whose application should be felt as a duty by arbitrators and which would be deemed known and recognized by all participants in international transactions, no matter where they come from.

In *Stolt-Nielsen*, the U.S. Supreme Court had an opportunity to make a step further from its previous decision in *Green Tree* where it refused to interpret the arbitration clause, because “arbitrators were well situated to interpret agreement”.

Bearing in mind the global influence of the American arbitration legal development, making such a step forward would have ment further advancement of international arbitration regime. Instead, the U.S. Supreme Court, in many scholars’ opinion, took a big step backwards.

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VIŠESTRANAČKE ARBITRAŽE: PROBLEMI I NAJNOVIJA DEŠAVANJA

Autor predstavlja ključna pitanja vezana za učešće množine subjekata sa položajem stranke u arbitražnom postupku. Spajanje arbitražnih postupaka, koje dovodi do nastanka višestranačkog procesnog odnosa, kao i pridruživanje i intervencija trećih lica, nepotpisnika arbitražnog sporazuma, razmatraju se sa svrhom identifikovanja mogućnih problema koje ovi instituti mogu izazvati u arbitražnom postupku. Najnoviji razvoj u pravosudnom pristupu procesnim pitanjima koje nameće učešće množine subjekata u ugovornom odnosu u kojem nastaje spor koji je povod arbitraži prikazan je kroz analizu odluke Vrhovnog suda SAD, koja je utvrdila temelje za ograničavanje višestranačkih arbitraža isključivo na situacije kada je učešće množine subjekata u jedinstvenom arbitražnom postupku izričito ugovoreno arbitražnim sporazumom.

Ključne reči: *višestranačke arbitraže, arbitražni sporazum, spajanje postupaka, pridruživanje, intervencija.*